U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 10980090

Date: SEPT. 03, 2020

Appeal of Texas Service Center Decision

Form I-140, Immigrant Petition for Advanced Degree Professional

The Petitioner seeks to employ the Beneficiary as a software developer under the second-preference, immigrant category for members of the professions holding advanced degrees. See Immigration and Nationality Act (the Act) section 203(b)(2)(A), 8 U.S.C. § 1153(b)(2)(A).

The Director of the Texas Service Center denied the petition and dismissed the Petitioner's following motions to reopen and reconsider. The Director concluded that the Petitioner did not demonstrate its required ability to pay the combined proffered wages of this and other petitions.

The Petitioner bears the burden of establishing eligibility for the requested benefit. Section 291 of the Act, 8 U.S.C. § 1361. Upon de novo review, we will withdraw the Director's decision and remand the matter for entry of a new decision consistent with the following analysis.

I. EMPLOYMENT-BASED IMMIGRATION

Immigration as an advanced degree professional generally follows a three-step process. To permanently fill a position in the United States with a foreign worker, a prospective employer must first obtain certification from the U.S. Department of Labor (DOL). See section 212(a)(5) of the Act, 8 U.S.C. § 1182(a)(5). DOL approval signifies that insufficient U.S. workers are able, willing, qualified, and available for a position. Id. Labor certification also signifies that employment of a foreign national will not harm wages and working conditions of U.S. workers with similar jobs. Id.

If DOL approves a position, an employer must next submit the certified labor application with an immigrant visa petition to U.S. Citizenship and Immigration Services (USCIS). See section 204 of the Act, 8 U.S.C. § 1154. Among other things, USCIS considers whether a beneficiary meets the requirements of a certified position and a requested immigrant visa classification. If USCIS approves a petition, a foreign national may finally apply for an immigrant visa abroad or, if eligible, adjustment of status in the United States. See section 245 of the Act, 8 U.S.C. § 1255.

II. ABILITY TO PAY THE PROFFERED WAGE

A petitioner must demonstrate its continuing ability to pay the proffered wage of an offered position, from a petition's priority date until a beneficiary obtains lawful permanent residence. 8 C.F.R. § 204.5(g)(2). Evidence of ability to pay must generally include copies of annual reports, federal income tax returns, or audited financial statements. Id.

In determining ability to pay, USCIS examines whether a petitioner paid a beneficiary the full proffered wage each year from a petition's priority date. If a petitioner did not annually pay a beneficiary the full proffered wage or did not pay him or her at all, USCIS examines whether the business generated sufficient annual amounts of net income or net current assets to pay the difference between the proffered wage and wages actually paid. If net income and net current assets are insufficient, USCIS may consider other factors affecting a petitioner's ability to pay a proffered wage. See Matter of Sonegawa, 12 I&N Dec. 612, 614-15 (Reg'l Comm'r 1967).[1]

Here, the accompanying labor certification states the proffered wage of the offered position of software developer as $135,283 a year. The petition's priority date is June 7, 2018, the date DOL accepted the labor certification application for processing. See 8 C.F.R. § 204.5(d) (explaining how to determine a petition's priority date).

At the time of the appeal's filing, regulatory required evidence of the Petitioner's ability to pay the proffered wage in 2019 was not yet available. For purposes of this decision, we will therefore consider the company's ability to pay only in 2018, the year of the petition's priority date.

The Petitioner submitted a copy of an IRS Form W-2, Wage and Tax Statement, for 2018. The form indicates that the company paid the Beneficiary total wages that year of $93,204.96. That amount does not equal or exceed the annual proffered wage of $135,283. Thus, based solely on actual wages paid to the Beneficiary, the record does not establish the Petitioner's ability to pay the proffered wage in 2018. Nevertheless, we credit the Petitioner's wage payments to the Beneficiary. The company need only demonstrate its ability to pay the difference between the proffered wage and the actual wages paid in 2018, or $42,078.04.

The Petitioner also submitted a copy of its federal income tax return for 2018. The return reflects net current assets of -$210,298 and net income of $143,600. The net income amount exceeds the $42,078.04 difference between the annual proffered wage and the actual wages the Petitioner paid the Beneficiary in 2018. The record therefore appears to demonstrate the Petitioner's ability to pay the Beneficiary's individual proffered wage. As the Director found, however, the Petitioner filed Form I-140 petitions for other beneficiaries. A petitioner must demonstrate its ability to pay the proffered wage of each petition it files until a beneficiary obtains lawful permanent residence. 8 C.F.R. § 204.5(g)(2). The Petitioner here must therefore demonstrate its ability to pay the combined proffered wages of this petition and any others it filed that were pending or approved as of this petition's priority date or were filed thereafter with priority dates in or before 2018. See Patel v. Johnson, 2 Fed.Supp.3d

[1] Federal courts have upheld USCIS' method of determining a petitioner's ability to pay a proffered wage. See, e.g., River St. Donuts, LLC v. Napolitano, 558 F.3d 111, 118 (1st Cir. 2009); Rahman v. Chertoff, 641 F. Supp. 2d 349, 351-52 (D. Del. 2009).

108, 124 (D. Mass. 2014) (affirming our revocation of a petition's approval where, as of the filing's grant, a petitioner did not demonstrate its ability to pay the combined proffered wages of multiple petitions).[2]

The Petitioner provided a list of four other Form I-140 petitions with 2018 priority dates, one with a filing date in 2019. Considering that we have not examined the Petitioner's finances for 2019 or under Sonegawa, however, we will remand this matter for the gathering of additional evidence.

On remand, the Director should notify the Petitioner in writing to submit copies of an annual report, federal tax return, or audited financial statements for 2019. The Petitioner may also submit additional evidence of its ability to pay the proffered wage that year, including proof of payments it made to applicable beneficiaries in 2019 and materials supporting the factors stated in Sonegawa.

III. THE REQUIRED EXPERIENCE

Although the Director did not so find, the record also does not establish the Beneficiary's qualifying experience for the offered position. A petitioner must demonstrate a beneficiary's possession of all DOL-certified, job requirements of a position by a petition's priority date. Matter of Wing's Tea House, 16 I&N Dec. 158, 160 (Acting Reg'l Comm'r 1977). In evaluating a beneficiary's qualifications, USCIS must examine the job offer portion of an accompanying labor certification to determine a position's minimum requirements. USCIS may neither ignore a certification term, nor impose additional requirements. See, e.g., Madany v. Smith, 696 F.2d 1008, 1015 (D.C. Cir. 1983) (holding that "DOL bears authority for setting the content of the labor certification") (emphasis added).

Here, the labor certification states the primary requirements of the offered position of software developer as a U.S. bachelor's degree, or a foreign equivalent degree, in engineering, computer science, or a related field, plus six years of experience in the job offered or in "Any Related Occupation." The labor certification also states the Petitioner's acceptance of an alternate combination of education and experience: a master's degree and four years of experience. In addition, part H.14 of the certification, "Specific skills or other requirements," lists required, technical skills.

On the labor certification, the Beneficiary attested that, by the petition's priority date and before joining the Petitioner in the offered position,[3] he obtained a U.S. master's degree in computer science and about four years, ten months of full-time, qualifying experience. The Beneficiary stated that his employment experience included:

- About eight months as a database manager at an advertising firm in India, from July 2015 to March 2016;
- About four months as a technical specialist at an information technology (IT) consulting

[2] The Petitioner need not demonstrate its ability to pay the proffered wages of petitions that it withdrew or that USCIS rejected, denied, or revoked. The Petitioner also need not demonstrate its ability to pay the proffered wage of petitions before their corresponding priority dates, or after their corresponding beneficiaries obtained lawful permanent residence.

[3] An employer generally can't rely on experience that a foreign national gained with it, unless the experience occurred in a substantially different position than the offered one or the employer can demonstrate the impracticality of hiring a U.S. worker for the offered position. 20 C.F.R. § 656.17(i)(3). The Petitioner here has not asserted that the Beneficiary gained qualifying experience with it.

company in India, from February 2015 through June 2015;
- ∑ About one year, three months as a senior consultant at a U.S. IT consulting firm, from September 2013 to December 2014; and
- ∑ About two years, seven months as a systems analyst at another U.S. IT consulting firm, from February 2011 through August 2013.

The Beneficiary's educational qualifications are not at issue. To support claimed, qualifying experience, a petitioner must submit letters from a beneficiary's former employers. 8 C.F.R. § 204.5(g)(1). The letters must include the employer's names, addresses, and a description of a beneficiary's experience. Id.

The Petitioner submitted letters from all four of the Beneficiary's purported, former employers. The letters, however, state different, corresponding employment dates than those indicated on the labor certification. The letter from the Indian advertising firm indicates its employment of the Beneficiary from July 6, 2015, to March 4, 2016, while the labor certification lists the corresponding employment dates as July 1, 2015, to March 1, 2016. The letter from the Indian IT consulting company states its employment of the Beneficiary from February 25, 2015, to July 3, 2015, while the labor certification indicates employment dates of February 15, 2015, to June 30, 2015. The certification states the Beneficiary's employment by one U.S. company from September 1, 2013, to December 15, 2014, while the company's letter indicates his work from only October 7, 2013, to September 30, 2014. In addition, the letter from the other U.S. company states its employment of the Beneficiary from only June 1, 2011, to August 31, 2013, while he attested on the labor certification to employment there from February 1, 2011, to August 30, 2013.

Overall, the letters from the Beneficiary's former employers state that he worked about eight months less than he claimed on the labor certification. The discrepancies in the Beneficiary's dates of employment cast doubt on his claimed, qualifying experience. See Matter of Ho, 19 I&N Dec. 582, 591 (BIA 1988) (requiring a petitioner to resolve inconsistencies of record with independent, objective evidence pointing to where the truth lies).

Also, on an application for a nonimmigrant visa in December 2015, the Beneficiary stated additional, inconsistent dates of employment. The visa application states his employment by one former U.S. employer from October 8, 2013, to November 30, 2014, and by the other from March 5, 2011, to August 31, 2013. These employment dates match neither those to which the Beneficiary attested on the labor certification nor those stated in the employers' letters.

In addition, on the December 2015 nonimmigrant visa application, the Beneficiary appears to have omitted his purported, former employment in India, both by the IT consulting company from February 2015 to June or July 2015 and by the advertising firm beginning in July 2015. Further, in a letter with the petition, the Petitioner stated its employment of the Beneficiary since October 23, 2015, casting doubt on most of his claimed experience with the Indian advertising firm. Thus, the letters from the Petitioner and the Beneficiary's purported former employers indicate that he lacks the minimum four years of experience required for the offered position.

The Petitioner submitted new letters from the Beneficiary's purported, U.S. employers. One company stated the Beneficiary's receipt of unpaid training from February 1, 2011, to June 30, 2011. The unpaid

nature of the training appears to explain why the company's initial letter did not indicate the Beneficiary's employment by the business from February 2011 through May 2011 as stated on the labor certification. But, if the Beneficiary received training through June 30, 2011, the record does not explain why the company's initial letter stated the business's employment of the Beneficiary beginning on June 1, 2011. See Matter of Ho, 19 I&N Dec. at 591 (requiring a petitioner to resolve inconsistencies of record). Also, the letter from the Beneficiary's other, purported, U.S. employer changes the Beneficiary's employment dates to match those to which he attested on the labor certification. But the document does not explain why the company's initial letter contained different employment dates. Id. The Petitioner stated that the initial letter of the Beneficiary's former employer omitted employment periods during which he did not work on a client project. Without additional documentation from the purported former employer, however, the record does not sufficiently support the claimed explanation. In addition, the record does not explain why the labor certification states the Petitioner's employment of the Beneficiary since April 20, 2016, but the Petitioner's letter states that the business began employing him on October 23, 2015.

Further, the Petitioner has not demonstrated the Beneficiary's knowledge of all the required technical skills listed on the labor certification. Part H.14 of the labor certification states that the offered position requires knowledge of "Hyperion Software 9/11, Essbase Analytics, MaxL and Esscmd, Financial Reporting, Hyperion Reporting, Hyperion Smart View, Oracle Database, Essbase Spreadsheet Add in, [and] BI+ Interactive Reporting."

The letter from the Indian IT consulting company states the Beneficiary's use of "Hyperion Essbase/Planning." The record, however, does not demonstrate that the letter refers to knowledge of Hyperion Software 9/11, Essbase Analytics, or some other listed technical skill. A letter from one of the Beneficiary's purported U.S. employers states that he gained experience with Hyperion Essbase, Hyperion Planning, Essbase Administrative Services, Hyperion Shared Services, Hyperion Excel Add-in, and Smartview. A letter from the Beneficiary's other purported U.S. employer states his experience with "Hyperion Finance" and "Hyperion Applications." The letters' descriptions, however, do not exactly match those of the skills listed on the labor certification. Without further information or documentation, the record does not establish that these letters indicate the Beneficiary's knowledge of the requisite, specified skills. In addition, none of the letters nor the Beneficiary's educational documents indicate his knowledge of MaxL, Oracle Database, or BI+ Interactive Reporting, as specified on the labor certification.

On remand, the Director's written notice should inform the Petitioner of these evidentiary deficiencies. The Petitioner must explain the inconsistencies of record and submit independent, objective evidence of the Beneficiary's claimed, qualifying experience.

The Director should afford the Petitioner a reasonable opportunity to respond to all issues on remand. Upon receipt of a timely response, the Director should review the entire record and enter a new decision.

IV. CONCLUSION

Additional evidence is needed to determine the Petitioner's ability to pay the proffered wage. The record also does not establish the Beneficiary's possession of the minimum experience required for the offered position.

ORDER: The decision of the Director is withdrawn. The matter is remanded for entry of a new decision consistent with the foregoing analysis.